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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 WILLIAM P. SHANAHAN,
12 Plaintiff,

13 v.

14 INTERNAL REVENUE SERVICE,
15 Defendants.

CASE NO. C08-560JLR
ORDER

16 **I. INTRODUCTION**

17 This matter comes before the court for a second time on Defendant Internal
18 Revenue Service’s (“IRS”) motion for summary judgment (Dkt. # 22). This court
19 previously determined that the IRS had not met its burden in withholding documents
20 under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and directed the IRS
21 to file a *Vaughn* index of a representative sample of the withheld documents. (*See* Order
22 of April 27, 2009 (“Order”) (Dkt. # 32) at 25-26.) Having reviewed the motion, as well
23 as all papers filed in support and opposition, the *Vaughn* index, all supplemental filings,
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1 and the balance of the record, and deeming oral argument unnecessary, the court
 2 GRANTS in part, DENIES in part, and RESERVES ruling in part on the IRS's motion
 3 for summary judgment. The court RE-NOTES the motion for consideration on
 4 November 23, 2009, and DIRECTS the parties to proceed as discussed in Parts III.E and
 5 III.F.

7 II. BACKGROUND

8 This is a dispute under FOIA. It arises against the backdrop of civil enforcement
 9 and criminal proceedings against Steven N.S. Cheung and Linda Su, a.k.a. Linda Cheung
 10 ("the Cheungs"), in connection with their alleged failure to report taxable income
 11 generated by West Coast International Limited ("WCI") and West Coast International
 12 (Parking) Limited ("WCIP") (collectively, "the Entities"). William Shannahan, counsel
 13 for both the Cheungs and the Entities, filed this FOIA case on behalf of the Cheungs.
 14 Because the parties are familiar with the factual and procedural background of this
 15 matter, the court incorporates by reference the background section of its previous order.
 16 (See Order at 1-7.)

17 The court previously declined to grant the IRS's motion for summary judgment.
 18 On April 27, 2009, after reviewing the motion and having heard argument, the court
 19 directed the IRS to file a *Vaughn* index¹ to provide the court and Mr. Shannahan with
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21 22 23 24 25 26 ¹ The "Vaughn index" takes its name from the District of Columbia Circuit's decision in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). See also *Bowen v. U.S. Food & Drug Admin.*, 925 F.2d 1225, 1227 n.1 (9th Cir. 1991). In *Vaughn*, the D.C. Circuit rejected an agency's conclusory affidavit and required the agency to provide detailed support for its claimed FOIA

1 additional information upon which to evaluate the claimed exemptions. (Order at 25-
 2 26.) The IRS timely filed its *Vaughn* index (*see* Second Declaration of Meghan M.
 3 Mahaney (“Sec. Mahaney Decl.”) (Dkt. # 36)), Mr. Shannahan filed a supplemental
 4 response (Resp. II (Dkt. # 37)), and the IRS filed a supplemental reply (Reply II (Dkt. #
 5 40)).

7 III. ANALYSIS

8 A. Preliminary Matters

10 1. Sufficiency of the *Vaughn* Index

11 The court directed the IRS to file a *Vaughn* index based on a representative
 12 sample of the withheld documents. (Order at 26.) The court specified that the
 13 representative sample should include documents from each of the five categories, *i.e.*,
 14 Examination Workpapers, Agents’ Working Papers, Interview Notes, Internal
 15 Correspondence, and the Electronic Database (*see* Order at 5-6), and cover at least 500
 16 pages of documents. (Order at 26.) The *Vaughn* index includes 24 sections describing
 17 individual documents and the rationales in support of withholding. In preparing the
 18 *Vaughn* index, the IRS determined that 24 pages of formerly withheld documents could
 19 be released subject to redaction. (Sec. Mahaney Decl. at 2.)

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 24 exemptions. *Vaughn*, 484 F.2d at 826-28. Under Ninth Circuit precedent, “[a] *Vaughn* Index
 25 must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3)
 26 explain how disclosure would damage the interests protected by the claimed exemption.”
Citizens Comm’n on Human Rights v. Food & Drug Admin., 45 F.3d 1325, 1326 n. 1 (9th Cir.
 1995).

1 Mr. Shannahan argues that the IRS has not complied with the court's instructions
2 regarding the *Vaughn* index. (Resp. II at 2-4.) He objects to the IRS's decision to
3 disclose additional documents at this time, argues that the *Vaughn* index is not user-
4 friendly and does not cover a sufficient number of documents, and contends that the IRS
5 has not demonstrated that the sample is actually representative. (*Id.*) The court
6 dismisses Mr. Shannahan's first two objections to the *Vaughn* index, but sustains his
7 third objection.

8 As to the first objection, the court is satisfied that the IRS's decision to disclose
9 additional documents, without more, does not vitiate its claimed exemptions. The IRS
10 has not conceded that these documents cannot be withheld, but rather made a
11 discretionary decision to release them. (Reply II at 2.) Likewise, Mr. Shannahan's
12 second objection is also unfounded. The *Vaughn* index is sufficiently user-friendly for
13 present purposes and includes a sufficient number of documents. As to the third
14 objection, however, the court agrees that the IRS has not identified how it selected the
15 documents described in the *Vaughn* index. Although the sample represents a roughly
16 proportionate selection from each of the categories (*see* Reply II at 2), Ms. Mahaney
17 does not identify what method she used to select documents. The IRS does not address
18 this issue in its supplemental reply. On this showing, the court cannot evaluate whether
19 the *Vaughn* index constitutes a representative sample of the withheld documents.
20
21 Therefore, as discussed in Part III.E., the court directs the IRS to provide supplemental
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1 information addressing this issue and describing how it selected the documents
2 discussed in the *Vaughn* index.

3 2. Motion to Strike

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5 The IRS also requests that the court strike the second declaration of David J.
6 Lenci on the ground that it falls outside the scope of the supplemental response
7 contemplated by the court's order. (Reply II at 1 n.1.) In his declaration, Mr. Lenci
8 discusses the ways in which discovery is necessary so as to supplement the information
9 in the *Vaughn* index. The court is satisfied that Mr. Lenci's declaration is reasonably
10 appropriate as it focuses on the sufficiency of the *Vaughn* index. The court denies the
11 IRS's motion to strike.

12 **B. Legal Standard**

13
14 Summary judgment is appropriate if the evidence, when viewed in the light most
15 favorable to the non-moving party, demonstrates there is no genuine issue of material
16 fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*
17 *County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the
18 initial burden of showing there is no material factual dispute and he or she is entitled to
19 prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets its
20 burden, the nonmoving party must go beyond the pleadings and identify facts which
21 show a genuine issue for trial. *Cline v. Indus. Maint. Eng'g. & Contracting Co.*, 200
22 F.3d 1223, 1229 (9th Cir. 2000).

1 “Summary judgment is the procedural vehicle by which nearly all FOIA cases are
 2 resolved.” *Los Angeles Times Commc’ns, LLC v. Dep’t of the Army*, 442 F. Supp. 2d
 3 880, 893 (C.D. Cal. 2006). The court conducts a *de novo* review of an agency’s
 4 response to a FOIA request. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep’t of Justice v. Reporters*
 5 *Comm. for Freedom of Press*, 489 U.S. 749, 755 (1989). The usual summary judgment
 6 standard does not extend to FOIA cases because the facts are rarely in dispute and courts
 7 generally need not resolve whether there is a genuine issue of material fact. *Minier v.*
 8 *Cent. Intel. Agency*, 88 F.3d 796, 800 (9th Cir. 1996). Courts instead follow a two-step
 9 inquiry when presented with a motion for summary judgment in a FOIA case. *Los*
 10 *Angeles Times*, 442 F. Supp. 2d at 893.

11 First, courts must evaluate “whether the agency has met its burden of proving that
 12 it fully discharged its obligations under the FOIA.” *Id.* The agency must demonstrate
 13 that it has conducted a search reasonably calculated to uncover all relevant documents.
 14 *Zemansky v. U.S. Envtl. Prot. Agency*, 767 F.2d 569, 571 (9th Cir. 1985). Second, if the
 15 agency satisfies its initial burden, the court must determine “whether the agency has
 16 proven that the information that it did not disclose falls within one of the nine FOIA
 17 exemptions.” *Los Angeles Times*, 442 F. Supp. 2d at 894. In meeting its burden, “the
 18 government may not rely upon ‘conclusory and generalized allegations of exemptions.’”
 19 *Church of Scientology of Cal. v. U.S. Dep’t of the Army*, 611 F.2d 738, 742 (9th Cir.
 20 1980) (quoting *Vaughn*, 484 F.2d at 826).

1 **C. FOIA Exemptions**

2 The IRS argues that the withheld documents are exempt from disclosure under
 3 FOIA Exemptions 3, 5, 6, 7(A), 7(C), and 7(E). (Mot. at 9-22; Reply II at 4-10.) Mr.
 4 Shannahan contends that the IRS has failed to present sufficient information to justify
 5 withholding under these exemptions. Having previously determined that the IRS
 6 conducted an adequate search (Order at 10), the court begins its present inquiry with the
 7 second step of the analysis: has the IRS established that the withheld documents fall
 8 within one or more of the claimed FOIA exemptions?
 9

10 1. Exemption 3 and 26 U.S.C. § 6103

11 Exemption 3 of FOIA incorporates nondisclosure protections established in other
 12 federal statutes. 5 U.S.C. § 552(b)(3). 26 U.S.C. § 6103(a) prohibits the disclosure of
 13 returns or return information and qualifies as a statute that exempts disclosure within the
 14 meaning of Exemption 3. *Kamman v. U.S. Internal Revenue Serv.*, 56 F.3d 46, 48 (9th
 15 Cir. 1995); *Johnson v. Comm'r*, 239 F. Supp. 2d 1125, 1137 (W.D. Wash. 2002).
 16 Section 6103(a) provides that “[r]eturns and return information shall be confidential,”
 17 and generally prohibits the government from disclosing returns and return information.
 18 26 U.S.C. § 6103(a). The statute defines “return information” to include:

19 [A] taxpayer’s identity, the nature, source, or amount of his income,
 20 payments, receipts, deductions, exemptions, credits, assets, liabilities, net
 21 worth, tax liability, tax withheld, deficiencies, overassessments, or tax
 22 payments, whether the taxpayer’s return was, is being, or will be examined
 23 or subject to other investigation or processing, or any other data, received
 24 by, recorded by, prepared by, furnished to, or collected by the Secretary
 25 with respect to a return or with respect to the determination of the
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1 existence, or possible existence, of liability (or the amount thereof) of any
 2 person under this title for any tax, penalty, interest, fine, forfeiture, or other
 3 imposition, or offense. . . .

4 26 U.S.C. § 6103(b)(2)(A). Despite the general rule, the IRS may disclose return
 5 information to a taxpayer so long as “the Secretary determines that such disclosure
 6 would not seriously impair Federal tax administration.” 26 U.S.C. § 6103(e)(7).

7 *i. Return Information*

8 The *Vaughn* index establishes that the withheld documents include “return
 9 information” under 26 U.S.C. § 6103(b)(2). Ms. Mahaney describes the nature of each
 10 document and explains why the information in the document constitutes return
 11 information.² Mr. Shannahan does not dispute that the withheld documents include
 12 return information. Having reviewed the *Vaughn* index, the court is satisfied that the
 13 IRS has demonstrated that the withheld documents include return information.

14 *ii. Serious Impairment of Federal Tax Administration*

15 A district court reviews *de novo* the IRS’s determination that the release of
 16 withheld documents would seriously impair Federal tax administration. *Long v. U.S.*
 17 Internal Revenue Serv., 742 F.2d 1173, 1182-83 (9th Cir. 1984); *Pac. Fisheries, Inc. v.*

22 ² For instance, Ms. Mahaney states that the information contained in Agents’ Working
 23 Papers pages 1022 to 1047 “is return information because the information sets forth accounting
 24 information used during the criminal and civil examinations to determine the proper tax liability
 25 of the Cheungs.” (Sec. Mahaney Decl. at 15.) Similarly, with respect to Examination
 26 Workpapers pages 449 to 452, Ms. Mahaney states that the information “is return information in
 that it was collected and prepared by the [IRS] to reflect transactions and other facts upon which
 the Cheung[s’] potential tax liability is based.” (Sec. Mahaney Decl. at 3.) These examples are
 typical of the *Vaughn* index.

1 *Internal Revenue Serv.*, No.C04-2436JLR, 2009 WL 1249296, at *3 (W.D. Wash. May
 2 6, 2009). The IRS bears the burden on this issue. *Long*, 742 F.2d at 1183. Although the
 3 IRS's determination is entitled to deference, the court nonetheless reviews the
 4 determination *de novo* and "must satisfy itself, on the basis of detailed and
 5 nonconclusory affidavits, that the Commissioner is correct in his belief that the
 6 disclosure of [the information requested] by [the plaintiff] would pose a substantial risk
 7 of impairing the collection, assessment, or enforcement of the tax laws." *Long*, 742 F.2d
 8 at 1183. Federal tax administration, as defined at 26 U.S.C. § 6103(b)(4), "embraces
 9 assessment, collection, enforcement and litigation under laws governing the application
 10 of the internal revenue laws," *United States v. Hobbs*, 991 F.2d 569, 573 (9th Cir. 1993),
 11 and "unquestionably includes the criminal enforcement of the internal revenue laws,"
 12 *Youngblood v. Comm'r*, No. 2:99-CV-9253-R(RNBX), 2000 WL 852449, at *9 (C.D.
 13 Cal. Mar. 6, 2000).

17 The IRS argues that all of the documents may be withheld pursuant to Exemption
 18 3 because their disclosure would seriously impair federal tax administration.
 19 (Declaration of Megan M. Mahaney ("Mahaney Decl.") (Dkt. # 22-3) ¶¶ 16(d), 17(d),
 20 18(d), 19(c), 20(c); Declaration of Cesar White ("White Decl.") (Dkt. # 22-4) ¶¶ 14-15.)
 21 Agent White asserts that release of the documents would or could (1) "allow the
 22 Cheungs to determine the nature, direction, scope, and limits of the criminal
 23 proceedings, and the strategies and theories being utilized by the government"; (2)
 24 "allow the Cheungs earlier and greater access to information about the proceedings than

they would otherwise be entitled to receive, and would deprive the government of reciprocal discovery since the Cheungs are now unavailable”; (3) “enable the Cheungs to craft explanations or defenses based upon the government’s analysis, depriving the government of the facts known to the Cheungs”; and (4) “enable the Cheungs to conceal or disguise income, or take other steps to avoid having income attributed to them.”

(White Decl. ¶ 15.) In response, Mr. Shannahan does not dispute that the types of harm alleged by the IRS would constitute serious impairment of federal tax administration. Rather, he argues that the IRS has not demonstrated a rational connection between release of the documents and the alleged harms. (Resp. II at 8-12.)

a. Insight into the Criminal Investigation

In the *Vaughn* index, Ms. Mahaney repeatedly asserts that the release of the withheld documents would substantially interfere with federal tax administration because it would allow the Cheungs greater insight into the scope of the criminal investigation than they would otherwise be entitled. (See Sec. Mahaney Decl. at 3-4, 6, 8-9, 11-12, 14-16, 18-19, 21-22, 24-29, 31-33, 35, 36, 38.) This type of harm can give rise to serious impairment of federal tax administration. *See Cal-Trim, Inc. v. Internal Revenue Serv.*, 484 F. Supp. 2d 1021, 1027-28 (D. Ariz. 2007); *George v. Internal Revenue Serv.*, No. C05-0955 MJJ, 2007 WL 1450309, at * 8 (N.D. Cal. May 14, 2007); *Youngblood*, 2000 WL 852449, at * 9. In and of itself, however, this is a boilerplate rationale that offers no particularized support for withholding. The bare fact that the Cheungs would otherwise not be entitled to information concerning the criminal

1 investigation does not mean that the release of certain documents would necessarily rise
2 to the level of substantial interference with federal tax administration.

3 Having reviewed the *Vaughn* index, the court concludes that the IRS has met its
4 burden under Exemption 3 and 26 U.S.C. § 6103 on this rationale with respect to
5 documents prepared by the IRS and other governmental agencies, but not with respect to
6 documents prepared by third-parties. First, the release of government-prepared
7 documents would expose the internal workings of the criminal investigation, including
8 its scope, focus, and strengths and weaknesses, thereby offering a depth of insight into
9 the investigation that otherwise would not be available to the Cheungs and that poses a
10 strong likelihood of substantially interfering with federal tax administration. Even
11 assuming the Cheungs know or have access to some of the factual information in
12 government-prepared documents, as argued by Mr. Shannahan, it does not follow that
13 the Cheungs know the precise contours of the government's knowledge or the ways in
14 which it used or is using the factual information. Further, Agent White's determination
15 that the release of these documents could enable the Cheungs to craft explanations or
16 defenses or to conceal or disguise income is entitled to some deference. *Long*, 742 F.2d
17 at 1182-83. The court is satisfied that Agent White is correct in his belief that the
18 disclosure of these withheld documents "would pose a substantial risk of impairing the
19 collection, assessment, or enforcement of the tax laws." *Id.* Therefore, the court
20 concludes that the IRS has met its burden in establishing that Exemption 3, in
21 connection with 26 U.S.C. § 6103, applies on this rationale with respect to Examination
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1 Workpapers pages 449 to 452, and 866 to 868, Agents' Working Papers pages 727 to
 2 747, 753 to 754, 870 to 871, 1654 to 1659, 1661 to 1675, 1713 to 1720, 1768 to 1774,
 3 1776 to 1843, 1939 to 1943, 1988 to 2040, 2085 to 2208, and 2210 to 2230, Interview
 4 Notes pages 1626 to 1642, and Internal Correspondence pages 1711 to 1712.

5 Second, by contrast, the IRS has not established that the release of documents
 6 gathered by the government but prepared by Fok & Chan or other third-parties is likely
 7 to cause substantial interference with federal tax administration. These documents are
 8 financial documents, such as balance sheets and profit and loss statements, pertaining to
 9 the Entities. This information appears likely to be generally known by the Entities and
 10 the Cheungs, regardless whether they have actual possession of the documents, because
 11 these are documents that presumably would have been provided to the Entities. For
 12 example, four of the documents described in the *Vaughn* index were prepared by Fok &
 13 Chan, a Hong Kong public accountant that Mr. Shannahan asserts is WCI's agent.
 14 (Resp. II at 10.) Although the release of these documents may interfere with the
 15 criminal investigation, it is difficult to discern how the interference would be substantial
 16 when the Cheungs likely already have general knowledge of this financial information
 17 and know that the IRS relied on these documents. Cf. *Grasso v. Internal Revenue Serv.*,
 18 785 F.2d 70, 77 (3d Cir. 1986); *Campbell v. Dep't of Health and Human Servs.*, 682
 19 F.2d 256, 260 (D.C. Cir. 1982).

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 25 The court is not persuaded by the IRS's argument that Mr. Shannahan has not
 26 presented evidence showing that this information is already known to the Entities and

1 the Cheungs. (Reply II at 5.) Rather, the *Vaughn* index itself raises questions about Fok
 2 & Chan's relationship to the Entities and the Cheungs that the IRS does not answer. Mr.
 3 Shannahan's failure to present evidence of Fok & Chan's relationship to the Entities
 4 does not relieve the IRS of its burden to show that these documents are properly
 5 withheld.³ On the present record, the court concludes that the IRS has not met its burden
 6 in establishing that Exemption 3, in connection with 26 U.S.C. § 6103, applies on this
 7 rationale with respect to Agents' Working Papers pages 518 to 535, 604 to 640⁴, 1022 to
 8 1069⁵, 1176 to 1181⁶, and 2671 to 2706⁷, and the Electronic Database.⁸

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12 ³ To the extent the IRS provides the court with additional information about these
 13 withheld documents, Mr. Shannahan's failure to provide any evidence regarding information in
 14 the possession of or known to the Entities and the Cheungs may prove of greater consequence.

15 ⁴ Agents' Working Papers pages 604 to 640 consist of "a chart with figures followed by
 16 receipts detailing the cash transactions undertaken by Mr. Cheung for the years at issue in the
 17 criminal and civil cases." (Sec. Mahaney Decl. at 8.) Ms. Mahaney explains that these pages
 18 "consist of information obtained from third parties." (Sec. Mahaney Decl. at 10.) It is not clear
 19 whether the IRS prepared any portions of these documents.

20 ⁵ Agents' Working Papers pages 1048 to 1069 are "[t]wenty-two pages of documents
 21 obtained by the Service detailing land assignments, deeds, land registries and corporate
 22 registrations undertaken on behalf of Stephen Cheung and/or the Entities." (Sec. Mahaney Decl.
 23 at 16.) Ms. Mahaney does not indicate which third-party prepared these documents. It is not
 24 clear whether these documents or the information contained therein is generally known to the
 25 Entities and the Cheungs.

26 ⁶ Agents' Working Papers pages 1176 to 1181 are "[f]ive pages of profit tax assessments
 27 bills and corporate information pertaining to WCI from Hong Kong." (Sec. Mahaney Decl. at
 28 17.) This information, although not prepared by Fok & Chan, also appears to be the type of
 29 information generally known to the Entities and the Cheungs.

30 ⁷ Agents' Working Papers pages 2671 to 2706 are described as "[a] 36 page chart
 31 obtained during the course of the criminal investigation and undated, listing checks over
 32 \$1,000,000 pertaining to WCIP as well as the dates of the checks and check numbers." (Sec.
 33 Mahaney Decl. at 33 (emphasis added).) These documents appear to be from an unidentified

b. Revealing the Source of Information

Ms. Mahaney also contends that the release of certain documents created by third-parties or unidentified parties would substantially interfere with federal tax administration by indicating the source of financial information. (*See* Sec. Mahaney Decl. at 8, 18.) This argument is not explained in depth with respect to Exemption 3. It appears, however, that the IRS believes disclosure would reveal the identity of individuals cooperating in the criminal investigation and thereby chill future cooperation. This type of harm might rise to the level of substantial interference with federal tax administration. The IRS, however, has not identified why the release of these documents would reveal their source, nor explained why revealing the source would actually be harmful. On the present record, the court finds that the IRS has not provided sufficient information to afford Mr. Shannahan an opportunity to intelligently advocate for the release of these documents and to afford the court an opportunity to intelligently judge the contest. *See Wiener v. Fed. Bureau of Investigation*, 943 F.2d 972, 979 (9th Cir. 1991).

third-party source. It is not clear whether this is information that may be generally known to the Entities and the Cheungs.

⁸ The Electronic Database contains information that was “prepared or gathered by the IRS.” (Sec. Mahaney Decl. at 37.) Although Exemption 3 and 26 U.S.C. § 6103 may apply to some files in the Electronic Database, the IRS has not provided the court with adequate information upon which to identify potentially exempt files.

1 2. Exemption 7

2 Exemption 7 of FOIA protects from disclosure “records or information compiled
 3 for law enforcement purposes” to the extent that the agency justifies its decision to
 4 withhold the documents by reference to one of six enumerated types of harm. 5 U.S.C.
 5 § 552(b)(7). Judicial review of an Exemption 7 claim requires a two-part inquiry. *Fed.*
 6 *Bureau of Investigation v. Abramson*, 456 U.S. 615, 622 (1982). First, the court must
 7 determine whether the documents qualify as records or information compiled for law
 8 enforcement purposes. *Id.* Second, the agency must show that disclosure would result
 9 in one of the six types of harm. *Id.*

10 In its previous order, the court determined that the withheld documents constitute
 11 records or information compiled for law enforcement purposes. (Order at 17-18.) The
 12 court also concluded that the IRS had met its burden under Exemption 7(C), but declined
 13 to grant summary judgment with respect to documents withheld under this exemption
 14 because the IRS had not performed a segregation analysis. (Order at 21-23.) The court
 15 therefore addresses the applicability of Exemptions 7(A) and 7(E).

16 i. Exemption 7(A)

17 Exemption 7(A) permits an agency to withhold law enforcement records that
 18 “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. §
 19 552(b)(7)(A). “The IRS need only make a general showing that disclosure of its
 20 investigatory records would interfere with its enforcement proceedings.” *Lewis v.*
 21 *Internal Revenue Serv.*, 823 F.2d 375, 380 (9th Cir. 1987); *Barney v. Internal Revenue*

Serv., 618 F.2d 1268, 1272-73 (8th Cir. 1980). In order to withhold documents under Exemption 7(A), the agency “must establish that it is a law enforcement agency, that the withheld documents were investigatory records compiled for law enforcement purposes, and that disclosure of those documents would interfere with pending enforcement proceedings.” *See Lion Raisins v. U.S. Dep’t of Agriculture*, 354 F.3d 1072, 1082 (9th Cir. 2004) (quoting *Lewis*, 823 F.2d at 379).⁹

The IRS has met its burden under Exemption 7(A) with respect to documents prepared by the IRS and other governmental agencies but not with respect to documents prepared by Fok & Chan and other third-parties. First, the IRS is a law enforcement agency for purposes of Exemption 7(A). *See Church of Scientology Int’l v. U.S. Internal Revenue Serv.*, 995 F.2d 916, 919 (9th Cir. 1993); *Lewis*, 823 F.2d at 379. Second, the court has previously concluded that the withheld documents constitute investigatory records compiled for law enforcement purposes. (Order at 17-18.)

Third, the IRS has demonstrated that disclosure of some but not all of the withheld documents would interfere with the pending enforcement proceedings. The court’s reasoning with respect to Exemption 3 and 26 U.S.C. § 6103 applies with equal

⁹ In 1986, Congress lowered the agency’s burden in showing harm from a demonstration that the release “would interfere with” to “could reasonably be expected to interfere with” enforcement proceedings. Other circuits have generally interpreted this change to broaden the protection of Exemption 7(A). *See Manna v. U.S. Dep’t of Justice*, 51 F.3d 1158, 1164 n.5 (3d Cir. 1995). In *Lion Raisins*, the Ninth Circuit quoted *Lewis* in articulating the applicable standard under Exemption 7(A). *Lion Raisins*, 354 F.3d at 1082. The *Lewis* court, however, applied the former version of Exemption 7(A), *Lewis*, 823 F.2d at 379, while the *Lion Raisins* court applied the current version, *Lion Raisins*, 354 F.3d at 1082. Although the *Lion Raisins* court did not expressly address the 1986 amendment, the Ninth Circuit’s decision confirms that the Exemption 7(A) standard remains unaltered from *Lewis*.

1 force here. In essence, while the IRS has established a rational link between the release
2 of government-prepared documents and interference with enforcement proceedings, it
3 has not identified such a connection with respect to documents prepared by third-parties.
4 On the present record, the IRS has not shown how the release of financial documents
5 prepared by Fok & Chan and others would interfere with enforcement proceedings. This
6 does not mean that the release of documents prepared by third-parties and subsequently
7 gathered by the IRS would not interfere with enforcement proceedings. Rather, it means
8 that the IRS has not explained in detail how releasing documents prepared by third-
9 parties would interfere with the government's criminal investigation. *See Lion Raisins*,
10 354 F.3d at 1084; *Grasso*, 785 F.2d 70, 77; *Campbell*, 682 F.2d at 260. In sum, the
11 court finds that the IRS has met its burden in demonstrating that Exemption 7(A) applies
12 with respect to with respect to Examination Workpapers pages 449 to 452, and 866 to
13 868, Agents' Working Papers pages 727 to 747, 753 to 754, 870 to 871, 1654 to 1659,
14 1661 to 1675, 1713 to 1720, 1768 to 1774, 1776 to 1843, 1939 to 1943, 1988 to 2040,
15 2085 to 2208, and 2210 to 2230, Interview Notes pages 1626 to 1642, and Internal
16 Correspondence pages 1711 to 1712, but has not met its burden under Exemption 7(A)
17 with respect to Agents' Working Papers pages 518 to 535, 604 to 640, 1022 to 1069,
18 1176 to 1181, and 2671 to 2706, and the Electronic Database.

23 ii. *Exemption 7(E)*

24 Exemption 7(E) permits an agency to withhold law enforcement records that
25 "would disclose techniques and procedures for law enforcement investigations or

prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). The government must show that the technique or procedure at issue is not well known to the public, *see Rosenfeld v. U.S. Dep’t of Justice*, 57 F.3d 803, 815 (9th Cir. 1995), and must describe the general nature of the technique or procedure at issue, although it need not provide specific details, *see Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004).

The court concludes that the IRS has met its burden in establishing that Exemption 7(E) applies to Agents’ Working Papers pages 753 to 754. In the *Vaughn* index, Ms. Mahaney explains in depth how the IRS uses discriminant function system (“DIF”) scores. (Sec. Mahaney Decl. at 12-13.) “DIF scores are compiled for the purpose of enforcing the Internal Revenue laws and, should the DIF core system be compromised, the IRS would have difficulty in efficiently allocating examination resources.” (Sec. Mahaney Decl. at 13.) The *Vaughn* index demonstrates that the DIF score system is a technique or procedure not well known to the public and sufficiently describes the general nature of the DIF score system. The IRS has met its burden under Exemption 7(E) with respect to these documents.

By contrast, the court denies summary judgment under Exemption 7(E) with respect to Examination Workpapers pages 867 to 868 because the IRS has provided only boilerplate rationales in support of withholding. (See Sec. Mahaney Decl. at 6.) The court previously determined that the IRS had provided no insight into the particular

1 techniques or procedures at issue, nor offered any discussion regarding whether the
2 techniques or procedures are well known. (Order at 25-26.) The IRS not remedied these
3 deficiencies with respect to Examination Workpapers pages 867 to 868. In its *Vaughn*
4 index, the IRS asserts that these documents are withheld pursuant to Exemption 7(E) for
5 the following reasons:

6 The Service is withholding pages 867-868 because the information in these
7 pages detail the techniques and procedure undertaken by the agent to
8 conduct this particular investigation with respect to the charge of . . . fraud
9 against the Cheungs; its disclosure would also provide insight into the
10 techniques and procedures undertaken with respect to the ongoing criminal
11 investigation, since the revenue agent obtained her information from the
12 criminal investigation.

13 (Sec. Mahaney Decl. at 6.) The *Vaughn* index adds no substantive information to the
14 IRS's original showing. The court finds that the IRS has not satisfied its burden in
15 demonstrating that these withheld documents are exempt under Exemption 7(E). The
16 court denies summary judgment under Exemption 7(E) with respect to Examination
17 Workpapers pages 867 to 868.

18 3. Exemption 6

19 Exemption 6 protects from disclosure "personnel and medical files and similar
20 files the disclosure of which would constitute a clearly unwarranted invasion of personal
21 privacy." 5 U.S.C. § 552(b)(6). "A 'similar' file is defined simply as a file which
22 contains information similar to that found in a standard personnel file." *Church of*
23 *Scientology of Cal.*, 611 F.2d at 746. The court previously declined to consider the
24
25

1 applicability of Exemption 6 because the IRS raised this argument in a footnote and did
 2 not analyze how the exemption applied to the facts of this case. (Order at 23.)
 3

4 The court denies summary judgment under Exemption 6 because the IRS has not
 5 established that the documents contain a sufficient amount of personal information to
 6 merit protection under Exemption 6. *See Church of Scientology of Cal.*, 611 F.2d at
 7 747. The IRS concedes that the withheld documents are not personnel or medical files,
 8 but argues that they may be withheld as “similar files.” (Reply at 7.) In its *Vaughn*
 9 index, however, the IRS fails to provide any description of the specific personal
 10 information at issue in the files. Without this type of particularized information, the
 11 court has no method by which to evaluate whether these documents constitute similar
 12 files under Exemption 6. Therefore, the court denies summary judgment under
 13 Exemption 6.
 14

16 4. Exemption 5

17 Exemption 5 of FOIA provides that an agency may withhold “inter-agency or
 18 intra-agency memorandums or letters which would not be available by law to a party
 19 other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). This
 20 exemption entitles an agency to withhold documents that a private party could not
 21 discover in litigation with the agency. *Pac. Fisheries*, 539 F.3d at 1148. “Specifically,
 22 it protects documents that would be covered by the attorney work-product privilege and
 23 the executive deliberative process privilege,” *id.*, as well as the attorney-client privilege,
 24 *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1084 n.1 (9th Cir. 1997).
 25

1 *i. Deliberative Process Privilege*

2 The deliberative process privilege protects “documents reflecting advisory
 3 opinions, recommendations and deliberations comprising part of a process by which
 4 governmental decisions and policies are formulated.” *Dep’t of Interior v. Klamath*
 5 *Water Users Prot. Ass’n*, 532 U.S. 1, 8 (2001). “To fall within the ‘deliberative process’
 6 privilege of exemption 5, the materials in question must be ‘predecisional’ in nature and
 7 must also form part of the agency’s “deliberative process.” *See Maricopa Audubon*
 8 *Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir. 1997).

9
 10 A “predecisional” document is one “prepared in order to assist an agency
 11 decisionmaker in arriving at his decision,” and may include
 12 “recommendations, draft documents, proposals, suggestions, and other
 13 subjective documents which reflect the personal opinions of the writer
 14 rather than the policy of the agency.” A predecisional document is part of
 15 the “deliberative process,” if “the disclosure of [the] materials would
 16 expose an agency’s decisionmaking process in such a way as to discourage
 17 candid discussion within the agency and thereby undermine the agency’s
 18 ability to perform its functions.”

19
 20 *Id.* (quoting *Assembly of State of Cal. v. U.S. Dep’t. of Commerce*, 968 F.2d 916, 920
 21 (9th Cir. 1992)). “Factual portions of documents covered by the deliberative process
 22 privilege must be segregated and disclosed unless they are ‘so interwoven with the
 23 deliberative material that [they are] not [segregable].’” *Pac. Fisheries*, 539 F.3d at 1148
 24 (quoting *United States v. Fernandez*, 231 F.3d 1240, 1247 (9th Cir. 2000)).

25 The court concludes that the IRS has met its burden in demonstrating that
 26 Exemption 5 and the deliberative process privilege apply in full or in part to
 27 Examination Workpapers 449 to 452 (full) and 866 to 868 (full), Agents’ Working

1 Papers pages 526¹⁰ (part), 531 (part), 534 (part), 727 to 747 (full), 1654 to 1659 (full),
 2 1661 to 1675 (full), 1776 to 1843 (full), 1939 to 1943 (full), 1988 to 2040 (full), 2085 to
 3 2208 (full), 2210 to 2230 (full), and Internal Correspondence pages 1711 to 1712
 4 (full).¹¹ In the *Vaughn* index, Ms. Mahaney explains that these documents were
 5 prepared by IRS personnel as part of the pre-decisional process connected to the
 6 investigations. These documents include, for example, handwritten notes and draft
 7 calculations. Having reviewed the *Vaughn* index, the court finds that these documents
 8 are pre-decisional because they were prepared to assist in the investigations and
 9 deliberative because their release would expose the IRS's decision-making process. The
 10 court thus concludes that Exemption 5 and the deliberative process privilege apply to
 11 these withheld documents.

12 The court rejects Mr. Shannahan's argument that the IRS has not properly
 13 invoked the deliberative process privilege. (Resp. II at 6.) In the FOIA context, unlike

14 ¹⁰ In the *Vaughn* index, Ms. Mahaney states that Agents' Working Papers page 524 is
 15 withheld under Exemption 5 and the deliberative process privilege. (Sec. Mahaney Decl. at 6
 16 n.3 & 7.) Ms. Mahaney, however, does not refer to page 524 when discussing the particularized
 17 rationale for withholding. (See Sec. Mahaney Decl. at 7.) The court therefore declines to
 18 determine whether Exemption 5 and the deliberative privilege process apply to Agents'
 19 Working Papers page 524.

20 ¹¹ The IRS asserts for the first time that it is withholding in part Agents' Working Papers
 21 pages 526, 531, and 534 under Exemption 5 and the deliberative process privilege. (Sec.
 22 Mahaney Decl. at 6 n.3.) This late assertion is troublesome and exposes the sharp power
 23 imbalance between the parties. An agency that raises new exemptions on a rolling basis without
 24 explanation and without leave necessarily does so at the agency's own risk. Nonetheless,
 25 because the IRS previously asserted Exemption 5 and the deliberative process privilege and Mr.
 26 Shannahan has had sufficient notice of these new assertions and an opportunity to respond, the
 court declines to consider these late assertions to have been waived by the IRS. The court
 cautions, however, that further late assertions of exemptions may not be accepted.

1 the common law context, an agency is not required to submit an affidavit from an
 2 agency head or high-level agency official to invoke the deliberative process privilege in
 3 conjunction with Exemption 5. *See Lardner v. U.S. Dep't of Justice*, 2005 WL 758267,
 4 at *8 (D.D.C. Mar. 31, 2005) ("[N]o court has ever indicated that such [a high-level
 5 agency] official must make the determination that a document comes within Exemption
 6 5, and the case law and the declarations in this case confirm that courts routinely accept
 7 a declaration from an employee at the agency other than a high-level official as
 8 documentation of an Exemption 5 deliberative process claim."); *CACI Field Servs., Inc.*
 9 *v. United States*, 12 Cl. Ct. 680, 687 n.7 (Cl. Ct. 1987) ("The only distinction between
 10 the deliberative process privilege when arising under FOIA and the privilege when
 11 invoked in this court is that in the context of FOIA no affidavit from the agency head is
 12 necessary to invoke it."). Mr. Shannahan has not identified any Ninth Circuit FOIA case
 13 law requiring the submission of an affidavit from an agency head or high-level official
 14 to invoke the privilege under Exemption 5. The court concludes that the IRS has
 15 properly invoked Exemption 5 and the deliberative process privilege.
 16

20 *ii. Attorney Work Product Privilege and Attorney-Client Privilege*

21 The court declines to consider the applicability of Exemption 5 and the attorney
 22 work product privilege and the attorney-client privilege. The few documents withheld
 23 pursuant to Exemption 5 and these privileges are also withheld pursuant to Exemption 3
 24 and Exemption 7(A). The court thus need not determine whether the IRS has met its
 25 burden here.

1 5. Summary of Exemptions

2 The IRS has established that Exemptions 3 and 7(A) apply with respect to all of
3 the withheld documents prepared by the IRS and governmental agencies described in the
4 *Vaughn* index. The IRS has also established that Exemptions 5 and 7(E) apply with
5 respect to a limited number of withheld documents. Nonetheless, as discussed above,
6 substantial questions remain. On this record, the court cannot conclude that the IRS has
7 met its burden with respect to similar withheld documents not described in the *Vaughn*
8 index.

9 Despite this conclusion, the court declines to grant Mr. Shannahan's request for
10 discovery at this time. (Resp. II at 14-15.) Discovery is the rare exception in FOIA
11 cases. *See Wheeler v. Cent. Intelligence Agency*, 271 F. Supp. 2d 132, 139 (D.D.C.
12 2003). The IRS has already provided the court and Mr. Shannahan with substantial
13 additional information in the *Vaughn* index. Although the court directs the IRS to file
14 additional supplemental information, as discussed below, the court is satisfied that
15 discovery would be premature at this juncture.

16 **D. Segregation**

17 Even if a FOIA exemption applies, an agency must disclose any reasonably
18 segregable portions of documents withheld pursuant to one of the FOIA exemptions. 5
19 U.S.C. § 552(b). The court addresses the issue of segregability only regarding those
20 documents as to which the IRS has established an applicable exemption. "The burden is
21 on the agency to establish that all reasonably segregable portions of a document have
22

1 been segregated and disclosed.” *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143,
 2 1148 (9th Cir. 2008). An agency can meet its burden by providing “an affidavit with
 3 reasonably detailed descriptions of the withheld portions of the documents and alleging
 4 facts sufficient to establish an exemption.” *Id.*

5 The IRS has met its burden in demonstrating that the documents prepared by the
 6 IRS and other governmental agencies are not reasonably segregable. In the *Vaughn*
 7 index, Ms. Mahaney provides descriptions of the withheld documents and identifies
 8 whether they are withheld in full or in part. With respect to the documents withheld
 9 pursuant to Exemptions 3 and 7(A), which are withheld in full by the IRS, the *Vaughn*
 10 index provides specific enough information to conclude that the IRS correctly
 11 determined that the documents are not reasonably segregable. The court finds that these
 12 documents are not reasonably segregable. The court thus grants summary judgment
 13 with respect to Examination Workpapers pages 449 to 452, and 866 to 868, Agents’
 14 Working Papers pages 727 to 747, 753 to 754, 870 to 871, 1654 to 1659, 1661 to 1675,
 15 1713 to 1720, 1768 to 1774, 1776 to 1843, 1939 to 1943, 1988 to 2040, 2085 to 2208,
 16 and 2210 to 2230, Interview Notes pages 1626 to 1642, and Internal Correspondence
 17 pages 1711 to 1712.¹²

22
 23 ¹² The court need not address whether the IRS has performed an adequate segregation
 24 analysis with respect to documents withheld under Exemptions 5 and 7(E) to the extent these
 25 documents are also withheld under Exemptions 3 and Exemption 7(A). Additionally, the court
 26 declines to consider whether the IRS has performed an adequate segregation analysis with
 respect to documents withheld under Exemption 7(C) until after the IRS files its second
 supplement. The court observes, however, that the *Vaughn* index provides little description of

1 The IRS has also met its burden in demonstrating that the portions of documents
2 withheld in part under Exemption 5 and the deliberative process privilege are not
3 reasonably segregable. The IRS asserts that Agents' Working Papers pages 526, 531,
4 and 534 are withheld in part under Exemption 5 and the deliberative process privilege.
5 Ms. Mahaney identifies these portions of the documents as handwritten notes and draft
6 calculations made by IRS personnel on financial documents prepared by Fok & Chan.
7 (Sec. Mahaney Decl. at 7, 13-14.) The *Vaughn* index provides sufficient information to
8 conclude that the IRS correctly determined that the portions are not reasonably
9 segregable. The court thus grants summary judgment with respect to the portions of
10 Agents' Working Papers pages 526, 531, and 534 withheld under Exemption 5 and the
11 deliberative process privilege.

12 **E. Additional Submission**

13 Having reviewed the *Vaughn* index submitted by the IRS, the court directs the
14 clerk to re-note the motion for summary judgment (Dkt. # 22) for consideration on
15 November 23, 2009. The court directs the IRS to file a second supplement in the form
16 of an affidavit or affidavits to address the court's concerns as identified in this order. To
17 the extent the *Vaughn* index constitutes a representative sample of the withheld
18 documents, the IRS should limit its supplement to the documents already described in
19 the *Vaughn* index. The IRS shall file this supplement by Wednesday, November 4,

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26 the particular types of information contained in documents withheld under Exemption 7(C) and
why the documents withheld in full could not be disclosed after reasonable segregation.

1 2009. Mr. Shannahan shall file a response not to exceed 10 pages by Monday,
2 November 16, 2009. The IRS shall file a reply not to exceed 10 pages by Monday,
3 November 23, 2009. The court notes that if the IRS's second supplement does not
4 resolve the issues presented, the court is strongly disinclined to allow the filing of
5 additional supplements.

7 **F. Original Documents**

8 The parties initially disputed whether original business documents ("Original
9 Documents") provided by the Entities to IRS Agent Molly Mahoney were subject to
10 disclosure. On May 22, 2009, the parties filed a joint status report indicating that Mr.
11 Shannahan would be allowed to make photocopies of the Original Documents. (Joint
12 Status Report ("JSR") (Dkt. # 35) at 1.) Mr. Shannahan has not requested further
13 assistance from the court with respect to the Original Documents. The court directs Mr.
14 Shannahan to file a status report regarding the Original Documents by September 25,
15 2009.

IV. CONCLUSION

The court GRANTS in part, DENIES in part, and RESERVES ruling in part on the IRS's motion for summary judgment (Dkt. # 22). The court denies the IRS's motion to strike. The court RE-NOTES the motion for consideration on November 23, 2009.

Dated this 3rd day of September, 2009.



JAMES L. ROBART
United States District Judge